BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Rulemaking for Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	Rulemaking 06-10-005

CITY OF CARLSBAD, CALIFORNIA APPLICATION FOR REHEARING ON DECISION 07-03-014

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Pursuant to Rule 16.1 of the Commission's Rules of Practice and Procedure, the City of Carlsbad, California respectfully submits the following Application for Rehearing on Decision 07-03-014, Adopting a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA"), mailed on **March 5, 2007**. The City of Carlsbad is a party eligible to file this application within the meaning of Rule 16.2(a), and Rule 1.4(a)(2)(ii), because the City filed comments in this proceeding.

I. ISSUE FOR REHEARING

The City requests rehearing on the Commission's conclusion, at pages 20-22 of the Decision, that Public Utilities Code Section 5930(b) authorizes the Commission to "require" automatic extensions of an incumbent cable operator's expired local franchise, or local franchise that will expire prior to January 2, 2008. The City maintains that Section 5930(b) expressly grants local authorities the discretion to grant such extensions.

II. DISCUSSION

Public Utilities Code Section 5930(b), by its express language, establishes discretionary authority for a local entity to extend a local franchise that is expired, or will expire before a state franchise issued to the incumbent cable operator becomes operative:

> When an incumbent cable operator is providing service under an expired franchise or a franchise that expires before January 2, 2008, *the local entity may* extend that franchise on the same terms and conditions through January 2, 2008. A state franchise issued to any incumbent cable operator shall not become operative prior to January 2, 2008.

(emphasis added). The plain language of Section 5930(b) thus establishes: (1) that local governments have the authority to grant an extension of an expired or expiring franchise; and (2) this authority is discretionary.

In the face of this clear and unambiguous statutory language, however, the Decision concludes the opposite – that "it is necessary and reasonable to require automatic extension of [local] video franchise that are held by incumbent cable operators planning to seek state franchise." (Decision, p. 22). Accordingly, the Decision alters and amends Section 5930(b) by replacing the permissive word "may" that the Legislature chose to use with the mandatory word "shall" that the Commission wants to use. Thus, according to the Decision, the language "*the local entity may extend that franchise*" establishes that (1) the Commission, rather than local entities, has authority to extend expired or expiring local franchises; and (2) that such extensions are mandatory and "automatic" upon application for a state franchise by an incumbent cable operator. In short, the Commission, by the Decision, usurps statutory authority that the Legislature clearly left to local governments.

The Decision attempts to justify this clear departure from the express language of the statute by undertaking a curious analysis. The discussion starts by acknowledging the most obvious interpretation of the words "*the local entity may extend*" the franchise: that the words "*could* mean that the Legislature gives the local franchising authority discretion regarding extension of a local franchise." (Decision, p. 20)(emphasis added). The Decision, unfortunately, then makes a rapid turn away from this plain language interpretation, reasoning that the word

"may" used by the Legislature "simply captures the uncertainty" of a situation where an incumbent cable operators with an expired or expiring franchise may want to "cease offering video service." (Id.). With this reasoning as a base, the Decision concludes:

> If the Legislature instead replaced "may" with 'shall," the statute would provide that "local entity shall extend [a] franchise – even if the incumbent cable operator that is a party to the franchise wants to cease offering service. Forcing an incumbent cable operator to continue offering service against its will would make little sense.

(Id.)

This analysis is not reasonable in several respects. First, its seems unlikely that the Legislature, by consciously choosing to use the term "may" instead of "shall," was concerned that a local entity exercising its authority under Section 5930(b) may be forcing an incumbent cable operator to continue to offer video service against its will. Indeed, the benefit the Decision erroneously provides to such incumbent cable operators – an "automatic" extension though January 2, 2008 – is counterintuitive on this point, because the extension allows the operator to continue providing service under the local franchise.

Second, by the plain language of the statute, the local entity has authority under the statute to unilaterally extend an expired or expiring franchise only through January 2, 2008. Since a state franchise obtained by an incumbent cable operator cannot become operative until that date, there is nothing in Section 5930(b) which has the effect of preventing an incumbent cable operator from beginning operation under a state franchise, rather than the local franchise, at the earliest date possible.

Finally, the reasoning arbitrarily considers only one side of the equation – the possibility that the Legislature was concerned about what an incumbent cable operator in this situation may or may not wish to do. The reasoning completely ignores that the express language of the statute points to the opposite concern – what a local entity, faced with a cable operator that triggered

either formal or informal franchise renewal proceedings under Section 621 of the Federal Cable Act (47 U.S.C. Section 546) – may or may not want to concerning the expired local franchise during the interim period. In this scenario, the status of the expired franchise is a matter of both federal cable law and state contract law. *See, e.g. Comcast v. Walnut Creek*, 371 F.Supp.2d 1147, 1154-56 (N.D. Cal., 2005). The Legislature provided adequate protection to the incumbent cable operator in Section 5930(b), which limits the local entity's discretion to extend the franchise "on the same terms and conditions" as the expired franchise. There is nothing in DIVCA which can be interpreted as a legislative grant of authority to the Commission to provide further protections to the incumbent cable operator, at the expense of the statutory authority the Legislature clearly reserved to local entities.

The Commission attempts to claim such a grant by pointing to Public Utilities Code Section 5810(a)(2)(A), which is part of the provisions of DIVCA which express the Legislature's guiding "principles" in enacting the legislation. Section 5810(a)(2)(A) provides that the legislation should, among other things:

> Create a fair and level playing field for all market competitors that does not disadvantage or advantage one service provider or technology over another.

The Decision erroneously concludes that this Legislative principle provides the Commission with authority to grant a legal remedy to an incumbent cable operator that the operator may not be entitled to under applicable law. *Comcast v. Walnut Creek*, 371 F.Supp.2d at 1154-56. This conclusion is arbitrary, in that it ignores the fact that in the body of DIVCA, the Legislature expressly provided the "level playing field" protections it intended to provide to incumbent cable operators – most significantly, the ability to abrogate a local cable franchise and begin providing service as a holder of a state franchise. Pub. Utilities Code. § 5840(o). The Commission is not authorized to create any further protections than the those that Legislature expressly authorized.

Finally, the Commission seeks to justify its amendment of clear statutory language by pointing to its interpretation of comments contained in an Assembly floor analysis of DIVCA. (Decision, p. 21). Such comments cannot support an unlawful enlargement of the scope of the Commission's authority under the statute, however, and certainly cannot support a Commission decision which amends or alters the plain language of the statute. *See, e.g. Communities for a Better Environment vs. California Resources Agency*, 103 Cal. App.4th 98, 108 (3rd Dist., 2002); *Henning v. Division of Occupational Safety*, 219 Cal. App.3d 747, 758 (1990); *Ontario Community Foundation vs. State Board of Equalization*, 35 Cal.3d 811, 816-817 (1984). Government Code Section 11342.2 provides that "[w]henever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective *unless consistent and not in conflict with the statute and reasonably necessary* to effectuate the purpose of the statute." (emphasis added). Even quasi-legislative actions, such as the Commission's action here, must be consistent with the controlling statute in order to be valid. *Communities for a Better Environment*, 103 Cal. App.4th at 109. As established above, the Decision is not consistent with the express language of the controlling statute, and impermissibly alters the statute's scope.

In addition, the Commission is action neither necessary nor reasonable. An operator which finds itself in the situation of operating under an expired franchise has several options – none of which necessitate unlawful enlargement of the Commission's authority under DIVCA. For example, the operator can negotiate a mutually agreed upon extension of the franchise until January 2, 2008, or longer, as cable operators and local entities have done for years. In fact,

many local entities and cable operators have, since the passage of DIVCA, already reached agreement on such extensions, without the need for improper Commission involvement. The cable operator can also move toward completion of the renewal process it triggered under the Federal Cable Act. In either scenario, DIVCA expressly provides an incumbent cable operator the protection the Legislature intended the operator to have – the opportunity to abrogate such a renewed or extended franchise when a competitive state franchise holder provided notice of intent to begin providing service. Pub. Utilities Code. § 5840(o)(3). No further protection by the Commission is necessary. The Decision is not valid.

III. CONCLUSION

The Legislature's intent with respect to the scope of Commission regulatory authority could not be more clear -- DIVCA "shall not be construed as granting authority to the commission to regulate the rates, terms, and conditions of video services, *except as explicitly set forth in this division*." Public Utilities Code Section 5820(c) (emphasis added). There is nothing in DIVCA which grants the Commission authority to require an automatic extension of a local franchise, whether that franchise expired before the effective date of DIVCA, or expires after the effective date of DIVCA but before January 2, 2008. Public Utilities Code Section 5930(b), explicitly and unambiguously grants that discretionary authority solely to local entities.

The Decision directly conflicts with, and alters, Section 5930 by transferring to the Commission the authority explicitly granted to local entities. This departure from the explicit language of the statue is neither reasonable nor necessary, and is a clearly erroneous and arbitrary enlargement of the regulatory authority the Legislature granted to the Commission in DIVCA. Accordingly, the City of Carlsbad respectfully requests rehearing on this issue, and

urges that the Commission revise the Decision and corresponding Order to clarify that Section 5930(b) grants sole authority to extend expired or expiring franchises to local entities.

Respectfully submitted,

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March 4, 2007

CERTIFICATE OF SERVICE

I certify that I have served a true copy of the original attached City Of Carlsbad, California Application For Rehearing On Decision 07-03-014 by transmitting an electric copy to each party named in the official service list as maintained on the California Public Utilities Commission's web page on all known parties of record in this proceeding or their attorneys of record.

Dated: April 4, 2007 at Washington, D.C.

_____/S/_____
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